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IN THE

Supreme Court of the United States

October Term, 1949

No. 205

D. LEE ANDREWS, *Petitioner*

v.

HAMILTON COUNTY HOSPITAL, et. al,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The Respondents are assuming in this brief that the Petitioner regarded what he termed his "Petition for a Writ" to include not only the petition but also the brief in support of it, all in one document; and in this brief the Respondents will so treat the petition.

JURISDICTION

The Petitioner's brief merely cites the section of the statute under which the final judgment of the Indiana Supreme Court may be reviewed by the Supreme Court of the United States. The Supreme Court Rule 27.2(c) requires more than that. It requires a "statement of the grounds upon which the jurisdiction of this court is invoked, embodying all that is required to be set forth in the statement described in " paragraph 1 of Rule 12. That is, the requirement for the establishment of jurisdiction in a petition for a writ of certiorari is substantially the same as the statement of jurisdiction required upon appeal.

This is an action brought by the Petitioner to enjoin the enforcement of certain rules and regulations adopted by the governing board of a county hospital in the State of Indiana, on the ground that the rules were unreasonable. The Supreme Court of Indiana found that part of the rules were unreasonable. But it held that the rule fixing the educational qualifications for one seeking to use the hospital facilities for the performance of surgery, were reasonable and should be enforced. The question as to whether the regulation of hospitals not owned and operated by the United States Government is within the police powers of the State and not within the police powers of the Federal Government, has already been decided by this Court in Hayman v. City of Galveston, (1927), 47 S. Ct. 363, 273 U. S. 414, 71 L. Ed. 714.

This case effectually settles the law on that point. There is, therefore, no substantial federal question left upon which to exercise the jurisdiction of the Supreme Court of the United States.

There is nothing in the petition or brief of the Petitioner under the heading Jurisdiction, or any place else in the petition and brief, which will support any assertion "that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court". (Rule 12.1)

QUESTIONS PRESENTED

The Petitioner's statement on page 2 of what he claims is the question presented lacks something in the way of accuracy. The question is not whether a discriminatory and arbitrary refusal to permit a fully qualified medical practitioner to use the facilities of a hospital invades the constitutional rights of the Petitioner. The Respondents maintain that there was no discriminatory nor arbitrary refusal; and that the practitioner was not qualified under the rules of the hospital to practice surgery in the hospital. So the question presented may be stated thus:

> Does the adoption of reasonable rules and regulations and the uniform enforcement thereof violate any of Petitioner's constitutional rights, where the result is that the Petitioner, although a licensed physician, is thereby required to have a qualified assistant at hand when he performs surgery in the hospital, which is a hospital supported by Hamilton County under a county hospital law in Indiana?

That was the question which was presented to the Supreme Court of the State of Indiana. On the petition for a writ of certiorari two additional questions are raised, which are: (1) whether or not the Supreme Court of the United States has jurisdiction to review the decision by the Supreme Court of Indiana of the first question; and (2) whether or not this case is one in which that jurisdiction should be exercised, if the jurisdiction exists.

CRITICISM OF, AND ADDITION TO, PETITIONER'S STATEMENT

The "STATEMENT" presented by the Petitioner does not afford an understanding of the true situation. Therefore, the Respondents submit the following as a criticism of the Petitioner's Statement, and an addition thereto. (These facts are in the record, but having no copy thereof we cannot give citations to it.)

1. The Petitioner entered Indiana University School of Medicine when he was about 33 years of age and graduated in 1938 when he was about 37. He immediately entered the practice of medicine and surgery, although he had had no interneship and no residency in any hospital. In this regard he did not follow the almost universal custom of those who are about to enter the practice of medicine on their own responsibility, as is shown by the fact that in a period of eleven years in Indiana University School of Medicine there were over 1200 graduates of whom all but six took at least one year of interneship, and of those six only three, of whom the Petitioner is one, entered the practice of medicine.

2. The only training the Petitioner received in surgery before going into the practice of it was the training he had in the Indiana University School of Medicine. But in the School of Medicine only didactic instruction in surgery is given. Training in surgery can be obtained only in interneship and residency. The Petitioner had no special training in surgery in the Fort Knox 1750 bed army hospital. He had only a rotating service. A rotating service is one in which he is in one type of medical practice for a while and then in another.

3. A certificate of service showing that his army specialty was plastic surgery shows no training in plastic surgery whatever.

When one enters the army as a doctor he fills in a form and in one of the blanks he indicates what type of work he would like to do. He may indicate a special interest, for instance, in plastic surgery. If he does, his record will show that his army specialty was plastic surgery. It is no evidence of any training in plastic surgery, or in anything else. It is only a statement of his choice of the kind of work he would like to do in the army.

4. While the Petitioner was in Louisville, Kentucky, he was excluded from practicing in three Louisville hospitals. He could only be a member of the Indiana State Medical Association and a fellow in the American Medical Association by being a member of a County Medical Society. He was not a member of the County Society.

5. After the Petitioner had gone into the practice of general surgery without training for that specialty and had been practicing for about a year, he then took a one month course in general surgery in Harvard University. Four years later while he was in the army he took a three months course in Columbia University. While he mentions eight hospitals in which he has practiced medicine he refers to only those in Louisville which have excluded him from practice in them, but he did not disclose whether there were any hospitals anywhere that were open to him at the time of the trial for the practice of major surgery.

6. There was no way by which the competency of the Petitioner to practice general surgery could be ascertained from his own statement as to the number of operations he had performed. This could be learned only by a study of the cases, including an inquiry into whether they needed the operations and what their physical conditions were at the time the operations were performed. It is well known that those who are in good health can endure an amazing amount of operative procedures of all kinds and still survive.

7. The educational qualifications of the Petitioner to practice general surgery have been questioned by the Hamilton County Hospital. The issue was before the Indiana Supreme Court, and it found that he was not qualified under the rules. See page 21 of Petition for Writ.

8. The statement of the superintendent approving the Petitioner's proposal to locate in Noblesville is no fact establishing his qualifications as a major surgeon nor the unreasonableness of

the rules challenged in this litigation. The fact that the Respondent Hospital is the only hospital in the county is no reason for it to be open for the practice of major surgery by one not qualified for such practice. Competent surgeons thoroughly qualified under the rules of the hospital are available to perform such service. Under the decision of the Indiana Supreme Court the Petitioner is allowed to practice in the hospital as a general practitioner. The Indiana Supreme Court found that the rules under which he would have been prohibited from carrying on such general practice on his own responsibility were unreasonable, and no effort of course is being made to enforce such rules.

9. The first paragraph on page 4 of the petition disregards the fact that the petitioner under the rules can always come into the hospital to perform any kind of service, even including surgery, provided he has a standby, qualified surgeon present for the protection of the patient. The paragraph also overlooks the fact that the Petitioner is permitted to engage in general practice in the hospital. What the superintendent and trustees meant regarding lack of knowledge of any reason why the Petitioner should not be permitted to practice on his own responsibility obviously was that they knew of no reason provided he would meet the educational qualifications.

10. In the second paragraph on page 4 of the petition he speaks of his failure to gain membership in the Hamilton County Medical Society. The Hamilton County Medical Society is not a party to this case. No member of it is. It was not called upon to give the reasons for denying membership to him. But nothing in that connection sheds any light on the question as to any educational qualifications of the Petitioner and the reasonableness of rules that were sustained by the Supreme Court of Indiana.

11. With regard to the last paragraph beginning on page 4, there is no basis for any inference that the rules and regulations were adopted for any other purpose than to maintain high standards for protection of the public. The trustees were required to adopt rules and regulations under the Indiana Hospital Law. The adoption of rules and regulations was not done hastily. It had been under consideration and study, and investigation of the rules had been under way for some time before they were finally adopted. There is no more reason for inferring

that the trustees, in adopting the rules, were acting for the sole purpose of blocking admission of the Petitioner than there would be to assume that the Petitioner got wind of the rules and regulations under consideration and thereupon tried to get a commitment for admission before the rules were adopted.

12. In the full paragraph on page 5 the Petitioner emphasizes the requirement for membership in the County Society. There is no longer any point to that emphasized language,—for the Indiana Supreme Court held that that requirement was invalid. So it affords no basis for a petition for a writ of certiorari. The same is true regarding the recommendation of the active medical staff. See Petition, pages 20 and 21.

13. The fixing of the date of March 1, 1947 as the date after which membership on the surgical staff can be obtained only by showing the special training referred to in the petition on page 5, was not unreasonable under the laws of the State of Indiana. In all cases where a beginning had to be made with respect to the establishment of standards similar classifications have been made and upheld, just as the Indiana Supreme Court said. See page 21 of the Petition.

14. The second paragraph on page 6 of the Petition contains the statement that the Supreme Court "failed to advert to the facts that these requirements were applicable only to physicians who were not members of the staff on March 1, 1947". That statement obviously was written without regard to the fact that the opinion shows that matter was "adverted" to by the Supreme Court. See Petition page 21.

In order that the United States Supreme Court may know conveniently the extent to which the "Statement" in the petition has omitted pertinent facts of the record attention is invited to the following:

OMISSIONS AND INACCURACIES IN PETITIONER'S STATEMENT

(References are to Appellants' Brief filed in the Appellate Court of Indiana. There is no printed copy of the Record available to which citations can be made for these statements, the Petitioner having failed to comply with the rules of this Court in regard to printing the record.)

1. No statement was made concerning the various kinds of surgery performed by the petitioner. Page 28.

2. No statement was made with reference to the fact that petitioner followed the profession of the ministry until about the time of graduation from medical school in 1938. Page 53.

3. There is no statement concerning the fact that he was denied the privilege of doing tonsillectomies in the Methodist Hospital at Indianapolis. Page 54.

4. No statement was made concerning the fact that he was not admitted to the Medical Society of Louisville, Kentucky. Page. 55.

5. No statement was made with reference to the fact that he was denied the right to practice his profession in three different hospitals in Louisville, Kentucky. Page 55.

6. No reference was made to the fact that he telephoned from Louisville to the Witham Hospital in Lebanon, Indiana, 140 miles of Louisville and asked permission to bring a patient from Louisville to Lebanon for a cesarean section, and was denied permission to do so. Page 56.

7. No reference was made to the fact that his license to practice medicine in Hamilton County is dated September 10th, 1947. Page 26.

8. No reference was made to the testimony of Dr. L. M. Headley, a witness called by petitioner, who testified as follows:

> "I cannot answer the question as to whether or not he is a skilled and competent surgeon without a little qualifying." Page 66.
>
> "Hospitals themselves set up general standards in order to maintain good operation of the hospital. That is common practice among hospitals. I think it is the reasonable thing to do in the management of the hospital." Page 67.
>
> "A physician who has graduated from a medical school but has had no special training for surgery would not ordinarily be admitted into a hospital for the practice of any special type of surgery, for instance surgery of the eye." Page 68.
>
> "I think it would be a nice thing if all our hospitals required special training." Page 68.

9. No reference was made to the testimony of Dr. John Hancock, a witness called by petitioner, who testified on cross-examination, as follows:

> "I presume it is more or less right, that to be a member of the staff one must have one year interneship." Page 70.
>
> "I think each hospital has its own requirements for admission of physicians and surgeons. The requirements vary." Page 71.
>
> "I think that probably Class A hospitals do not permit general surgery on the basis of having only a general license to practice medicine." Page 72.

10. No reference was made to the testimony of Paul Manship a member of the Hospital Board, who testified that the formulation of rules and regulations for the hospital had been under consideration since about the year 1945 until their final adoption on September 9th, 1947. Page 74.

11. No reference was made to the testimony of C. A. Craig, a member of the Board of Trustees, who testified concerning adoption of rules and regulations which had been under consideration for two or three years. Page 75.

12. No reference was made to the testimony of Carrie Cox Bell, a member of the Board of Trustees, who testified concerning the adoption of rules and regulations and the attempt to have the Hamilton County Hospital registered by the American Hospital Association. Page 78.

13. No reference was made to the testimony of Kittie McKelvey, Superintendent of the Hamilton County Hospital, who testified concerning the rules and regulations and the attempt to have the hospital registered by the American Hospital Association, and as to conversations with petitioner with reference to petitioner's attempt to have his patient admitted into the hospital as a surgical case without giving any diagnosis or statement concerning the patient's disease. Page 80-82.

14. No reference was made to Exhibit 2 which is form of application for federal aid in the construction of a new hospital which contains a statement with reference to the minimum standards required. Page 83.

15. No reference was made to the testimony of John D. Van Nuys, Dean of the Indiana University School of Medicine, who testified as follows:

> "Hospitals generally recognize the necessity for special training for surgery. It is the general practice of hospitals not to admit physicians to do surgery although they have a general license to practice medicine in all its forms, unless they have had special training in surgery. The amount of special training for surgery usually required by hospitals is one year of interneship and three years of certified residency." Page 93.

He also testified that the rules and regulations conformed to the usual rules and regulations with respect to requisite training or surgery. Page 101.

He also testified that hospitals need guiding rules and regulations to protect their patients and to guarantee professional high quality . . . . . Without such rules and regulations it would be impossible to operate a reasonable and safe hospital. Page 102.

He Said:

"I feel that the hospital has the right in accepting a patient to enforce certain standards that would be in the interest of the patient." Page 104.

"A physician who has had one month in Harvard and three months in Columbia School of Medicine after graduation from Indiana University School of Medicine, that training, in my opinion would not be sufficient to qualify the physician for general surgery." Page 107.

"Graduating from Indiana University School of Medicine would not quality one to perform the surgery listed." Page 107.

"Out of 1200 graduates of Indiana University School of Medicine in the past eleven years, I find six graduates who did not have interneship. Three of the six entered the practice of medicine; the other three are women, two of whom are married and have established homes, and the other is an assistant in a student health service; and one of the three first mentioned is Dr. Andrews." Page 108.

"Hospitals generally would not permit the surgery listed on Exhibit. . . . to be performed with the qualifications of petitioner, as listed in question." Page 109.

"The Board of Plastic Surgeons requires five years training after the year of interneship." Page 110.

"Work in one's own office or hospital with no one else working as a preceptor or supervisor of his work would not be accepted as satisfactory for qualifying one to enter into the practice of general surgery in an accredited and registered hospital." Page 111.

"I base my assumption that he is not qualified to perform the operations stated upon what is ordinarily recognized in the various communities as standard practice .... He is qualified to get an M. D. degree, just as I have an M. D. degree, but I would not do major surgery because I am not competent." Page 116.

16. No reference was made to the testimony of J. B. H. Martin, Administrator of the Indiana University Hospitals, who testified that:

"There are recognized standards that are required of all hospitals to entitle them to register with the American Hospital Association. Certain of these standards apply to the qualifications of physicians and surgeons for admission to the staff of the hospitals." Page 117.

He further testified that the rules and regulations in question:

"are reasonable standards generally considered as proper in this day for hospitals." Page 118.

"I would not think it would be good policy on the part of a hospital and in the interest of the general public for a hospital to permit one who had no specialized training in surgery to perform general surgery in the hospital." Page 119.

"As a hospital administrator it is my opinion a hospital which would permit physicians immediately upon graduation and without any interneship to perform surgery would not be classed as a first class hospital in protecting its patients. Such practice would be detrimental, in my opinion, to the general welfare of the patients who sought treatment in the hospital and generally detrimental to the public interest." Page 119.

17. No reference was made to the testimony of Dr. E. H. Clauser, Chairman of the Indiana Hospital Council, who testified as follows:

"Most of the hospitals do not permit physicians who have just graduated from medical schools to come into

them and perform major surgery. As far as I know, all registered hospitals follow that practice." Page 121.

"I don't think any physician who graduated from Indiana University School of Medicine without further preparation for surgery would be competent to perform the whole list of items of surgery contained in defendants' Exhibit 3." Page 121.

"I believe it would be very bad practice in the operation of a hospital to permit a physician with only that amount of training to come in and perform all those items of surgery." Page 122.

He further testified that the rules and regulations in question are reasonable and set forth minimum requirements, and for a hospital in Indiana to be approved by the Indiana Hospital Council, it would be required to conform to such requirements. Page. 123. Such requirements are in the interest of the general public. Page 124.

"The fundamental interest of all regulations is the safety of the patient." Page 125.

No reference was made to Exhibit 5 which consists of rules and regulations adopted by the Indiana Hospital Council. Page. 126.

"The State holds a hospital responsible for safe-guarding the patient and in doing that they must select membership of the staff." Page 132.

18. No reference was made to the testimony of Dr. Robert E. Jewett, Executive-Secretary of the Indiana Hospital Council and a member of the Staff of the State Board of Health, who testified as follows:

"The rules and regulations with respect to qualifications of physicians apply both to public and private hospitals. Under the hospital laws of the State of Indiana, the Council cannot make any distinction between public and private hospitals. Whatever is required of a private hospital is also required of a public hospital.

All hospitals must alike conform to the rules and regulations of the Council. It is the prerogative of the hospital itself to establish such rules and regulations regarding appointments to the medical staff as the governing board deems necessary. In the last two years several hospitals have adopted formal written policies

> and regulations. I would say there is a universal tendency to require graduation from an accredited school, at least one year of rotating interneship, and as to specialties, including surgery, the minimum requirement I would say would be two years of accredited training in an approved residency or sufficient continuous service in surgery as an assistant or junior surgeon under a surgeon with adequate qualifications." Page 140.

19. No reference was made to defendants' Exhibit 6 and 7, which are pamphlets published by the American Hospital Association, recommending minimum standards for hospitals and membership on medical staff. Page 144.

20. No reference was made to the testimony of Nellie G. Brown, Superintendent of Ball Memorial Hospital, Muncie, Indiana, who testified as follows:

> "We require interneship for general practice in our hospital and have for several years. The older men were admitted without interneships. Interneships and residencies were not then available, but since they have become available we require them." Page 156.

> "We require that any man coming in to practice surgery be a graduate of a Class A school; that he has served his interneship, and that he has had three years of organized experience in surgery, which may be divided between a two-year surgical residency and two years as an assistant." Page 156.

She further testified that the rules and regulations in question are reasonable and conform to the usual standards of hospitals throughout the country. Page 157.

21. No reference was made to the stipulation which shows that there are twenty-five duly licensed physicians residing in Hamilton County engaged in medical practice; that only twenty-two have membership in the Hamilton County Medical Society; nor that the constitution and by-laws of the Hamilton County Medical Society in force for more than twenty-five years did not require one year of interneship or any period of residency as a prerequisite to admission, but all doctors who have become members of said Society within the past twenty years, have had one year of interneship. Page 159.

22. There was no reference to the testimony of petitioner with reference to his membership in the Indianapolis Medical

Society and the American Medical Association, which under the evidence is a disputed fact. Page 135.

ON PETITIONER'S ALLEGED REASONS FOR GRANTING THE WRIT

This case involves no question of any discriminatory and arbitrary restrictions. The citations in Plaintiff's Brief and quotations under No. I, from pages 7 to 9, have no application to any fact in this case. No case is cited by the Petitioner supporting the proposition that a license to practice medicine in Indiana means the right to perform any kind of service within the field of medicine whether the service requires special training or not, even though the licensee has no special training. Indiana could, by direct legislative command, fix the qualifications for entrance into any hospital, either public or private, for the performance of major surgery. In effect it has done so. It has passed laws expressly authorizing the boards of trustees of county hospitals such as the Respondent Hospital, to adopt rules and regulations for their government.

Burns Indiana Statutes 1933, *Section* 22-3229;
Burns Indiana Statutes 1933, *Section* 22-3230;
Burns Indiana Statutes 1933, *Section* 22-3232.

The right of Respondent Hospital to adopt rules and regulations was further confirmed by the Hospital Licensing Law approved March 9, 1945, Acts 1945, Chapter 346, page 1639; Section 42-1601 Burns Supplement; and by the rules and regulations promulgated by the Indiana Hospital Council which were introduced in evidence on the trial of this case.

The Supreme Court of Indiana in the course of its opinion in this case held:

"It is our opinion that that requiring membership in the staff is such a general rule as is contemplated by the foregoing quoted statute", referring to Burns 1933, Section 22-3232.

The Supreme Court further held:

"We recognize the right of public hospitals to make and enforce reasonable rules for the protection of its patients. In fact such power is expressly conferred by the sections of our

statutes above quoted. We judicially know, and the testimony in this case amply illustrates, that a license to practice medicine does not guarantee that the holder thereof is capable of doing surgery."

This case presents only a question of local law, and the actual facts of the case show that the rules in question are thoroughly reasonable. But besides that there is no evidence that they are unreasonable. There is no question involved in this case that has not already been settled by this Court, and there is no question involved regarding any discrimination. This is a case to which the following statement from the United States Supreme Court definitely applies:

"Save in exceptional circumstances, not now present, we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. The due process clause does not take up the laws of the several states, and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

American, etc. v. Kentucky, 273 U. S. 269, 47 S. Ct. 353, 71 L. Ed. 639.

Under No. II, on page 9, the Petitioner says, "That arbitrary discrimination was practiced and enfored against your petition is not open to doubt." The statement is more than open to doubt. It is directly contrary to the truth in the case. Somewhere there had to be a beginning of the application of a standard of proficiency to be applied to surgeons for the protection of the general public using this hospital. If the Petitioner complied with the rules he could get in on the same terms as any of the others who complied with the rules.

The action of the County Medical Society in rejecting his application for membership is not open to inquiry in this appeal. The Petitioner tries to make it appear that there was something sinister in the action of the Society, now that the case is on appeal. But he did not see fit to open the inquiry in the trial and ask for the reasons why he was not admitted.

There is no significance whatever in the dates on which any actions were taken, either by the Society or the Hospital, as has already been shown.

The Indiana Supreme Court assumed nothing in this case. It acted upon the facts that were abundantly supported by the evidence. The complaint of the Petitioner was that the rules were invalid and unreasonable. Here again we need the record to cite for the purpose of showing what issues were submitted by the Petitioner in the beginning of this litigation. He made no complaint of any action of the County Medical Society except merely to state that he had been refused admission. This is all he said about the Society in his complaint:

> "That the Hamilton County Professional organization has refused to admit plaintiff as a member thereof and is the organization referred to in Article V of said rules adopted by said Board of Trustees of said Hamilton County Hospital."

He did not state that the action of the Society wronged him or that he wanted its action inquired into. He merely presented their action as a fact, without comment. The people he complained of were the Superintendent and the members of the Board of Trustees. His whole complaint was regarding the validity of the rules. But now on appeal he attempts to inject into the case what he calls the "context of surrounding circumstances". This should not draw attention away from the only questions in this case on his complaint which are:

(1) Were the rules regarding educational qualifications reasonable?

(2) Did the Petitioner meet those rules?

The rules regarding qualifications for the practice of surgery were not considered *"in vacuo"*, as the Petitioner charges on page 10 of the Petition. The very practical problem was involved of protecting the lives of the patients admitted into the hospital and preventing the hospital from being used to the disadvantage of the public. Surgery is not performed "in vacuo". It requires cutting and getting right into the vital arrangements of human beings. If it were done "in vacuo" there would be no need of precaution.

There is no mystery about why the Respondents adopted and now seek to enforce the rules, in spite of the innuendo in the note on page 10 of Petitioner's Brief. It is to comply with the law, and protect the public against inadequate preparation of physicians who desire to use the hospital.

All that the Petitioner needs to do, under the decision of the Indiana Supreme Court, to get into this hospital and perform general surgery is to make reasonable preparation to perform that service.

There is no case which, either directly or indirectly, by general principle or by specific statement, supports the position of the Petitioner. If there is such a case it has not been cited in the petition, and attorneys for Respondents have been unable to find it.

It would be a staggering blow to the programs and policies of the hospitals of the United States for the protection of their patients if this Court were to hold that rules and regulations setting up educational qualifications now generally recognized by all hospitals of repute and standing are unreasonable. Yet in view of the issues made by the pleadings in this case and by the decision of the Supreme Court of the State of Indiana, that appears to be the only ground on which this Court could set aside the decision of the Supreme Court of Indiana. It is respectfully maintained that for this Court to grant the petition for a writ of certiorari would do violence to the principles of law clearly and correctly stated and well established by decisions of this Court.

WHEREFORE, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted

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